84-61

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

PALESTINE BOONE,

Petitioner

vs.

MASS TRANSIT ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is a 5'5" minimum height requirement for a Baltimore City bus driver's job which excluded approximately 7.3% of the male population in the United States between the ages of 18-74, but would exclude some 69.7% of the female population of that same age group, a bona fide occupational qualification (BFOQ), under §703(e) of the Civil Rights Act of 1964, as amended, 42 USC §§2000e, et seq, where (1) the requirement resulted in an almost exclusive male driving force; (2) where the minimum height requirement was not validated or proven job related within applicable EEOC guidelines; and (3) where the employer reserved the right not to exclude all or substantially all applicants within the class, but reserved the right to employ applicants who were less than minimum height on the basis of a bus driver's "test" that was not validated or otherwise proven to be job related along EEOC guidelines, and where the passage of the test was based exclusively upon the subjective opinion of company safety and management personnel?

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To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

Petitioners repsectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this matter entered in the above case on April 16, 1984.

OPINIONS BELOW

The April 16, 1984 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported in an unreported slip decision of the Fourth Circuit, Docket No. 83-1837, and is reprinted in the separate Appendix to this Petition pp A.1-A.8. The prior opinion of the United States District Court for the District of Maryland, is also reprinted in the Appendix, pp A.9-A.26.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1984. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1254(1), and 2101(c).

QUESTION PRESENTED

Is a 5'5" minimum height requirement for a Baltimore City bus driver's job which excluded approximately 7.3% of the male population in the United States between the ages of 18-74, but would exclude some 69.7% of the female population of that same age group, a bona fide occupational qualification (BFOQ), under §703(e) of the Civil Rights Act of 1964, as amended, 42 USC §§2000e, et seq, where (1) the requirement resulted in an almost exclusive male driving force; (2) where the minimum height requirement was not validated or proven job related within applicable EEOC guidelines; and (3) where the employer reserved the right not to exclude all or substantially all applicants within the class, but reserved the right to employ applicants who were less than minimum height on the basis of a bus driver's "test" that was not validated or otherwise proven to be job related along EEOC guidelines, and where the passage of the test was based exclusively upon the subjective opinion of company safety and management personnel?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§2000e-2(a), (1), and (2) and (e):

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate or classify his employees or applicants for employment in any which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

and

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employ-

ees...on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that business or enterprise...

STATEMENT OF THE CASE

This action was brought by Palestine Boone, a female applicant for a bus driver's position with the Mass Transit Administration, for herself and all other persons similarly situated for denial of employment as a bus driver. The plaintiff was allegedly denied employment in August, 1974, pursuant to the MTA's policy of denying employment as a driver to anyone who was less than five feet five inches tall. The plaintiff's motion for class certification was denied. Thereafter, the parties filed cross motions for summary judgment. The court subsequently entered judgment for the defendant, on the basis that height was a bona fide occupational qualification (BFOQ) and/or business necessity, "essential to the safe and efficient operation of [the

MTA's] business as a public carrier." The trial court also found that reasonable alternatives for actual testing of applicants on buses, other than those non-validated tests actually applied, were unavailable to the defendant. The named-plaintiff appealed. The United States Court of Appeals for the Fourth Circuit affirmed.

THE EVIDENCE

The named plaintiff herein charged the Mass Transit Administration of Balitmore, Maryland with sexual discrimination against her and her class of similarly situated persons as a matter of practice and pattern in the hiring of female bus drivers in violation of Section 703, Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The named-plaintiff alleged that she was denied employment as a bus driver by the MTA despite her qualification for the job after she passed a written test and physical examination on August 1, 1974, and solely because she did not meet the MTA's minimum height requirement of five feet five inches. The named-plaintiff alleged that the minimum height requirement discriminated against herself and

women as a class and favored men, because the national height average for adult males was 5'8" while that of females was 5'3". The named-plaintiff also alleged the height requirement was not a bona fide occuptional qualification necessary to the safe and efficient operation of the MTA's business.

The MTA, in its answer admitted that the named plaintiff was administered a written and physical examination on August 1, 1974 and "admits she was rejected for employment as a bus operator because she failed to meet the defendant's height requirement..." The defendant further admitted that the named-plaintiff passed the written examination, but "did not meet the physical qualifications due to her height, and was rejected for employment."

The MTA admitted in discovery that "from 1974 until May 19, 1976, an applicant's height was required to be between 5'6" and 6'2" without shoes.[1] The MTA ad-

1. A letter from the MTA Director of Personnel to the EEOC, dated March 20, 1975, indicates that the 5'6" to 6'2" requirement was in effect from 1955 to July, 1973, and that in July, 1973, the minimum was dropped to 5'5". A further memorandum from the Director of Personnel indicates that all height requirements were dropped on May 10, 1976.

mitted in its Anwers to Interrogatories that it took no steps to modify its buses in order to permit operation thereof by shorter people or by people of the plaintiff's height during the years its minimum height requirement was in effect. The defendant further admitted that the height requirement was "a safety measure," that the "seating alignment on the existing equipment did not permit optium visibility for persons not within the specified height range," and that "no formal validation efforts were made at the time the requirement was implemented" or at the time it was dropped in 1976.

As also shown in discovery the named-plaintiff reapplied for employment as an MTA bus driver in March, 1978 and was hired in 1979, and was assigned to the Harford Division as a driver on March 14, 1979. The buses in service at the Harford Division at the time the named-plaintiff was employed as a driver at the Division were acquired in 1965, 1971, 1974, 1975 and 1978. The defendant further admitted that it modified none of the buses to permit the named-plaintiff to operate them. The named-plaintiff operated these buses

at all times since her employment. The defendant does not know whether she experienced any difficulty in driving buses because of her height.

As shown in discovery, applicants for employment as bus drivers at the MTA during the years 1974-1976 were evaluated on the basis of interviews, written tests, physical examination and a background investigation (including a police record check). In addition an applicant needed a valid Maryland driver's license, good driving record, and a good work history. The named-plaintiff herself (according to her Affidavit) was about 22 years of age when she was denied employment at the MTA in 1974 because of her height. She was a high school graduate with almost four years of college credit at the time, and stood less than 5'4" in height in her stocking feet.

The plantiff asserted in her Affidavit that when she was tested and interviewed for the job, in August, 1974, she thought she was being offered the job, but when she stood up "the man looked at me, and told me I was too short." "He apologized to me, saying I was too short and there was nothing further he could do." The

plaintiff further asserted that at the time she was called in for a job interview in August, 1974, she "met all of their qualifications save one - my height."

In the plaintiff's affidavit she asserted she was not acutally tested on an MTA bus until March, 1976, during the conciliation phase of the EEOC Investigation of her complaint, which she timely filed upon her initial rejection for employment in August, 1974.[2] She stated she reapplied for employment on March 26, 1978, and following testing and physical examination, and following her re-testing on MTA buses, she was employed and assumed driving duties in March, 1979 and has remained in this job to date. She stated that the MTA put her height down on her 1978 application as 5'1-1/2" tall, but that she is "really closer to 5'3" tall."[3] In her Affidavit

2. The named-plaintiff filed her EEOC complaint against the defendant on October 30, 1974, alleging her rejection for employment because of her height. She alleged this rejection was sex discrimination.

3. For purposes of this Writ, however, the named-plaintiff will hereafter be considered as being 5'1-1/2" tall, in conformance with her stated height on her 1978 MTA job application, and as shown on MTA statistics, which were admitted in evidence before the trial court, and which was found to be her "measured" height by the trial court. See Appendix, 9.

she also asserted that since being assigned to the Harford Division in March, 1979, and most recently to the Eastern Avenue Division, that she has driven "every series of buses assigned to the Division — many of which were in use prior to 1974," and at "no time have I been unable to operate a bus because of my height or for any other reason."

The EEOC findings were before the court. The EEOC investigated the plaintiff's complaint and found that as of the date of its report (September 16, 1975), 2.7% of the MTA's 1470 bus operators were female. The EEOC further found (on a statistical check of one out of every five drivers) that two female drivers were 5'5" and 5'-3-3/4" in height, which demonstrated "that a person five feet fiv inches (5'5") tall, or below, is

4. The affidavit of the named plaintiff's brother (also an MTA bus driver and also admitted in evidence) stated that one series of MTA bus (the 1900-1949) series was discontinued about 1978, and that none of this series was at the Harford Division while his sister drove there. He further stated, however, that "many pre-1974 buses were in use there" and were driven by his sister.

capable of performing the duties of the job." The EEOC further found that the Statistical Abstract of the U.S. Bureau of Census, indicated that 80% of adult females are less than five feet five inches tall, with the average female between 18 and 79 being 5'3" tall, while the average male was 5'8" tall. Thus, the EEOC found that "it is evident that Respondent's minimum height requirement of five feet, five inches (5'5") has the effect of disqualifying considerably more females than males." THE EEOC thus found, there being no BFOQ involved, that it was "reasonable to conclude sex discrimination has occurred."

The evidence submitted via discovery and attached to the Memorandum in Support of Plaintiff's Motion for Summary Judgment established that the MTA's minimum height requirement was lifted altogether on May 19, 1976, and that thereafter until January 5, 1979, the MTA hired some 46 female bus drivers who were under 5'6" and some 31 who were under 5'5" tall. This evidence also established that in May and June, 1977 the MTA hired two female drivers who were 5'2" and 5'-1-1/2" inches tall respectively. The evidence further

shows that in September, 1977 the MTA hired a female driver who was 5'1-3/4" tall. The same evidence further established that the MTA hired a female driver in October, 1978, who was 5'0" in height, and that on January 5, 1979 it hired the named plaintiff who was 5'1-1/2" tall.

The female hires who were hired in 1977 and who were 5'2", 5'1-1/2" and 5'1-3/4" tall were hired prior to the phase out of most of the so-called "old style" buses (i.e., the 1900-1974 series), which were apparently phased out in 1978. But company evidence showed that as late as March, 1979, the MTA"s fleet consisted of 1,018 buses, of which 15 were of the old type (i.e., the 1900-1949 series). Moreover, in addition to the foregoing employees, the statistics furnished by the MTA reveal that a sampling of every fifth MTA driver (by badge number) showed that one driver (badge number 365), who was 5'3-1/2" tall and who was hired in 1953, was still driving MTA buses in the mid-seventies.[5]

5. The parties stipulated that all drivers drove all series of buses at the MTA In their respective divisions.

The U.S. Department of Health, Education and Welfare Height Statistics for the Height of Adults in the United States, 18-74 Years of Age, 1971-74, were submitted to the Court and were attached to the Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment. This publication, published in May, 1979, of which the court was asked to judicially notice, reveals that a minimum height requirement of 5'5" would exclude only 7.3% of the male population in the United States between the ages of 18-74, but would exclude some 69.7% of the female population.

THE RULINGS BELOW

The trial court found that the company's five foot six inch minimum height requirement was terminated in 1976. Appendix, 10. In reality this should have been a finding that the company terminated its five foot five inch minimum height requirement in 1976. The trial court further noted that the plaintiff contended that the company hired numerous drivers who were less than five foot five "who drove the 'old-style' equipment (i.e., the 1900 to 1949 series), which is the type that allegedly presented problems for short and tall people." The trial

court further observed that the plaintiff states "that defendant hired many female drivers less than five feet six (and who were also less than five foot five) after 1976 who subsequently drove "the old style" equipment until the equipment's 1978 phase out date." Appendix, 10.

The trial court then observed that the defendent asserted it was dubious if its height requirement "caused any disparate impact," since the minimum requirement (which was detrimental to women) was offset by the maximum 6'2" requirement which was detrimental to men. The trial court noted that the defendant also contended that its height requirements constituted a "bona fide occupational qualification" (BFOQ) and/or business necessity. The trial court noted that the defendant aserted that the "short drivers" referred to by the plaintiff who worked for the MTA Prior to 1974 were "grandfathered" into the defendant's employment, and in any event those "short drivers" hired before 1974 and after those hired after May, 1976 were taller than plaintiff (who was measured as 5'1-1/2" tall on her 1978

application for employment).

The trial court then observed that the parties stipulated that between July 9, 1976 and October 27, 1978 the defendant employed eleven females less than five foot six inches tall. Although the trial court did not refer to the exact heights involved, the stipulation actually revealed that ten of these eleven employees were 5'3-3/4" tall or less, while the eleventh employee was 5'4" tall.[6] Three of the employees were 5'3" tall, two were 5'2-1/2" tall and one hired on (September 30, 1977) was 5' 1-3/4" tall (i.e., 1/4 inch taller than the plaintiff).[7] The trial court found (as the parties stipulated) that these eleven employees passed safety checks on "old

6. This finding of fact by the trial court is not in complete compliance with the evidence. One of the female drivers, who drove "old style" equipment and who was hired on June 17, 1977 was 5'1-1/2" tall, the exact height of the named-plaintiff. This employee was Dianna B. Sutton, and her badge number was 1482.

7. The stipulation, however, failed to include the name of Dianna B. Sutton. See footnote 6, supra, who was hired on June 17, 1977, and was the exact height of the plaintiff. It is assumed that the stipulation, which was drafted by the defendant, was in error in this regard.

type" coaches (series 1900-1949). The parties further stipulated in this regard, and the trial court so found that while it was not known whether these individuals ever had occasion to operate the "old type" equipment while employed by the MTA, "each operator was required to drive any and all vehicles in service of their divisions, and as such may have operated these old-type coaches." The company further stipulated that "in any event, the MTA found (these eleven employees) capable of safely operating such equipment." See trial court's finding in this regard at Appendix, 12.[8]

While the trial court made no finding in regard to pre-1974 equipment (other than the 1900-1949 series of buses) that was in fact driven by the plaintiff after she was hired in 1979, the defendant admitted in discovery that the plaintiff, after her employment in 1979 at the Harford Division drove buses acquired in 1965, 1971, 1974, 1975 and 1978. Thus, it is submitted in this regard,

8. It can be assumed that the trial court's finding in this regard would also include the name of Dianne B. Sutton, who was 5'1-1/2" tall and hired by the MTA On June 17, 1977, which was apparently omitted from the stipulation by error of counsel in view of the data relating to this employee's employment, as shown in the MTA statistics.

that the uncontested evidence revealed that numerous employees under five feet five drove or were qualified to have driven MTA buses prior to the 1974 rejection of the plaintiff for employment. It is submitted that the plaintiff drove buses acquired by the company before 1974 after she was hired in 1979. It is also submitted that many employees, male and female alike, drove MTA buses, including the series 1900-1949 coaches, after May, 1976 until the discontinuance of the 1900-1949 series "about" 1978, including one female driver who was hired in September, 1977, who was 5'1-3/4" tall (and who the company stipulated could safely operate the 1900-1949 series of coaches), and an additional employee, Dianne B. Sutton, who was 5'1-1/2" tall who was hired on June 17, 1977.

The trial court also found as a matter of fact that the plaintiff herein, while denied employment in August, 1974, was not tested on MTA buses to ascertain if she could safely operate them until March, 1976. The trial court found that the defendant, according to its affidavits, concluded that the plaintiff "was not able to safely operate the older type equipment then in service."

The trial court thus found that based on test results which showed plaintiff's vision might be impaired because of her size," and that she had trouble reaching the brake pedals, that MTA thus (in 1976) "continued its refusal to hire the plaintiff." Appendix, 14.

The trial court found that the plaintiff again applied for employment with the MTA as a bus operator in March, 1978, and was examined and interviewed in December, 1978. The court noted that the height requirements had been eliminated in May of 1976, and that all applicants who were hired thereafter and who were formerly not within the guidelines were tested on board a bus. It was at the same time (i.e., May, 1976), the court found that the company ceased including height requirements in its advertisements for applicants. The court also found that in December, 1978 the "older model coaches" (presumably the 1900-1949 series) comprised less than 2% of the MTA's fleet, and that at the time of plaintiff's employment at the Harford Division in January, 1979, that there were "no old style coaches" in that Division. Appendix, 14, 15. Again it is presumed that the court was referring to the series 1900-1949 coaches as

not being at the Harford Division at the time the plaintiff was assigned there (in March, 1979) as the evidence was clear that there were other pre-1974 buses in service at Harford.

After setting forth the above evidence, the trial court found that the burden was upon the party moving for summary judgment (here there were cross motions), and further found that the court was "satisfied that the issue to be resolved is one of law and not of fact and that decision (in the present case) under rule 56, is appropriate." Appendix, 15. The trial court then observed that the present case involved disparate impact as distinct from disparate treatment; and, as such, that the first step to be taken by the court was to determine whether "the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." The trial court cited Dothard v. Rawlinson, 433 U.S. 321, 329 (1977), as authority for the conclusion. The trial court next found that "upon review of similar cases in which minimum height requirements were found to have a disparate impact upon females," that it would therefore "assume without deciding that plaintiff could

indeed prove a prima facie case of discrimination." Appendix, 17.

The trial court next found that the defendant had successfully defended its minimum height requirements as a BFOQ. The court found that "the record as a whole, including the affidavits of the MTA personnel," convinced the court that the MTA's "height requirement was essential to the safe and efficient operation of its business as a public carrier," and as such had satisfied its BFOQ burden. Appendix, 17. The court expressly found that the "public interest in safety" is "paramount and justifies high employment standards," and that as the human risk factor in hiring "an unqualified applicant increase," the employer's burden to show that his job criteria are job related, declines. Appendix, 18, 19.

The court specifically found that the MTA's height standard was "profesionally determined" and "that the persons not meeting the height requirements in all likelihood could not safely operate the (old type) equipment because of limited vision." The trial court thus found that it would not interfere with the policy determinations of the MTA. It also found that the plaintiff

was "tested on the old-type equipment and company representatives found that she was unable to safely operate it." The court further found that after the phase out of "the old" equipment, she applied and did in fact receive a job. The court further found that the plaintiff admittted she had never driven an "old type" bus (i.e., series 1900-1949 coache). Appendix, 20.

The trial court thus found that while the company "did not empirically analyse its employment standards" (i.e., validate them within EEOC guideline requirements) its job requirements were nonetheless "professionally" developed and "essential" to its business.[9] The court further found that "empirical validation of employment tests, as described in EEOC guidelines, is not required in all contexts," particularly where "a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great." Appendix, 21. Thus, the

9. The finding that the tests were "professionally developed" is seriously flawed by an absence of any supporting evidence in the record. See the discussion herein of the affidavits of Mr. Dipietro and Mr. Park, infra.

court found "that empirical validation is not required under the circumstances of this case in light of the significance of safety to passengers and members of the public...when it comes to bus transportation," and that the company "must be accorded some reasonable leeway in ensuring the safety of passengers and others." Appendix, 23.

The trial court further found that no alternatives were available to the company other than the imposition of height requirements. The court found that those drivers who were shorter than company minimums who were hired before 1976 "were grandfathered into defendant's employment," and those hired after 1976 successfully passed "tests" on old-type coaches. The court also found that plaintiff was shorter "than any of these drivers, and did not meet the same safety tests."[10] The court also found that the company was under "no duty to redesign or purchase" buses better suited for shorter drivers, and accordingly, found that the plaintiff had not

10. As noted in footnotes 6 and 7, supra, and the related text, one of these drivers was the same height as the plaintiff (i.e., Dianne B. Sutton), and a second driver was 1/4 inch taller than the plaintiff.

met her burden of showing that "other selection devices without a similar discriminatory effect would also have served the employer's legitimate interest in safe and efficient job performance." Appendix, 24. The court thus ruled that the company was justified in "using this selection criteria as a BFOQ," and that "reasonable alternatives" (aside from "testing" applicants on the buses) "were unavailable to defendant." Appendix, 25.

The affidavits of MTA personnel upon which the court relied in its holding that the MTA had met is BFOQ burden and had proven its "height requirement was esential to the safe and efficient operation of its business as a public carrier," and that its "tests" were "professionally developed", etc., are found in the affidavits of Mr. Lorenzo T. Dipietro, and Vertia A. Parks, which were submitted to the trial court. Mr. Dipietro was shown by his affidavit to be the current Personnel Manager at the MTA, and prior to that he had served for 16 years as Supervisor of Personnel. He began work for the MTA in July, 1955, was a bus operator for 4-1/2 years, and a Street and Safety Supervisor for 4 years before assuming his managerial position with the comp-

any. He attached a physical standard document to his affidavit which set forth minimum height requirements among a host of other physical qualifications that were applicable to applicants for bus operator jobs during the mid-1970's. In regard to height requirement this document simply showed "height 5'6" to 6'2" without shoes." According to Mr. Dipietro these "physical standards" were developed "by MTA personnel and private physicians employed by the MTA on a contract basis."[11] Mr. Dipietro restated the history of height requirements at MTA on page 2 of his affidavit. At the bottom of the page 2 of his affidavit he stated that Greyhound Bus also advertised for bus drivers who were over 5'7" in height. In paragraph 9 of his affidavit he stated that as of December 31, 1973 MTA's fleet of buses numbered 903, of which 198 "were of the old types;" that by October, 1974, the MTA fleet consisted of 924 buses, of which 199 (or slightly in excess of 20 percent) of which

11 This reference to private physician was the only reference to any "professional" in put into the requirements involved. Also, there is no indication that the height requirement itself (as opposed to the other physical qualification shown on the document in question) was in any way established by a physician.

were of the old type; and that as of March, 1979 the MTA had 1018 buses, of which 15 were of the "old type" (i.e., series 1900 through 1949). Mr. Dipietro asserted in paragraph 10 of his affidavit that "the configuration of the old type buses was such that operators who were under 5'6" tall or over 5'6" tall had limited range of vision."

Mr. Dipietro further stated that he personally witnessed plaintiff's "test" on March 8, 1976 when she was seated in an old type bus. His affidavit picks up at this point:

> While Ms. Boone was seated in the operator's seat in an old type coach, I stood outside of the coach, approximately three feet in front of the right hand corner, and asked if she could see me. After she responded affirmatively, I held out my hand waist — high to simulate a small child, and asked her if she could see my hand. Ms. Boone responded that she could not. Immediately, thereafter, a person 5'11" in height assumed the driver's seat, and was able to see both me and later my hand being held at waist level.

Based on the foregoing "test," and upon his "experience" Mr. Dipietro opined that it was his "opinion and believe that Palestine Boone was unable to safely operate the MTA's old type equip-

ment." Mr. Dipietro nor did anyone else, however, offer an opinion as to how drivers who were only 1/2 inch taller than the plaintiff, or 1/4 inch taller than the plaintiff or her own exact height could be tested on the same equipment and successfully pass the "test," nor did anyone explain how a female driver employed by the company in 1953, who was 5'3-1/2" tall, could safely operate the "old style" buses for years. The trial court's reference to these employees as successfully passing the test (and the 1953 employee as being "grandfathered" into employment) hardly answers the question, or does it lend credibility or otherwise "validate" the "test," or show that it was "professionally developed." On the contrary, the fact that employees the same height as the plaintiff, or only 1/4 inch taller than the plaintiff could "pass the test" and that an employee only two inches and 1/2 inches taller than the plaintiff could have driven the buses for years lends emphasis to the conclusion that the "test" was not a valid test, and that it was in fact an arbitrary test that permitted MTA supervisors to exclude the great bulk of their female applicants

for years until forced to drop the height requirement in 1976 by the EEOC.

The second and last MTA affidavit relied upon by the trial court as proving the necessity for the minimum height requirement was that of Mr.Vertis A. Park. Mr. Park's affidavit reveals that he was the MTA Superintendent of Safety and Training, and had served in that capacity for 12 years. He had also driven a bus for 2-1/2 years, and was a supervisor for 3-1/2 years. Mr. Park stated that the height requirements were in effect at the time he came to work for the company. He described these requirements, and their change in 1973, where the minimum was dropped to 5'5", etc. He did not, however, explain what prompted the change, or even if it was safety related. Mr. Park also went to some length in describing MTA old style buses and new style buses and included diagrams of these buses, showing their exact dimensions. The newer buses have wider and taller windshields, as demonstrated in the diagrams. Mr. Park stated he also observed Ms. Boone's March 8, 1976 test on old style equipment, and that in his opinion

she had difficulty reaching the brake pedal, and was unable to see Mr. Dipietro's hand when he held it waist high. Based on his experience, he opined that Ms. Boone could not safely operate MTA buses because of the above factors. He further opined in his opinion that pesons under 5'6" and over 6'2" in height "had difficulty safely operating the old type equipment." [12]

The foregoing evidence was the total extent of MTA evidence upon which the trial court based its opinion that MTA's "height requirement was

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12. There was noticeably absent, in regard to the "hand held at waist height test" administered by Mr. Dipietro and witnessed by Mr. Park, any showing at all that it was even job related, much less professionally developed, or empirically validated. There was also no showing that employees 5'6", or 5'8" tall could or did pass such a "test." Additionally, the "having trouble reaching the pedals" test was not further explained. For instance, was the driver's seat in its furthermost forward position at the time? Or could the seat have been lowered? Also, the test was not shown to be job related. For example, could the plaintiff have operated the bus — i.e., have safely driven it — despite this observation of Mr. Park? There was no showing that this "difficulty" actually impaired plaintiff's driving ability; nor was it shown that plaintiff ever drove the bus at all in the so called "test" administered to her in 1976.

essential to the safe and efficient operation of its business as a public carrier," and that its height requirements in this regard and its "tests," were "professionally developed," that "the persons not meeting the height requirements in all likelihood could not safely operate the (old type) equipment," and that the plaintiff was "tested on the old type equipment and company representatives found that she was unable to safely operate it." [13]

In view of the absence of a showing of job relatedness, much less an empirical validation of the "test" involved, or of the height requirements, plus the uncontradicted evidence that almost a score if not more employees less than the company's minimum height requirement operated the equipment in question, one of whom was the same height as

13. The trial court did not make any finding or even discuss the fact that a 1976 "test" could justify a 1974 rejection of employment. In other words, should not the party with the burden of proof have to account for its 1974 rejection on the basis of circumstances that existed then, when the plaintiff was simply told she was too short, and was not "sat" on a bus at all?

the plaintiff and a second who was only 1/4 inch taller than the plaintiff, it is submitted that the trial court's findings in this regard are plainly erroneous andarbitrary, and that the company's defense of BFOQ is completely unsubstantiated.

The conclusion is buttressed, of course, by a reading of Dothard v. Rawlinson, 97 S.Ct. 2720 (1977), wherein in an almost identical situation the Supreme Court ruled that statutory height and weight restrictions involved in that case had a discriminatory imact on women applicants. 97 S. Ct., 2727. In that case the Supreme Court brushed aside justifications of the type offered here to show the job relatedness of the requirements. The Supreme Court ruled in this regard:

> If the job-related quality (i.e., strength) that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. (Emphasis added).

97 S.Ct., 2728.

While strength was the subject of inquiry in Dothard, height would be the subject of inquiry here. Thus, adopting the language of Dothard just

quoted, and applying it to the present case, the quotation would read:

> If the job-related quality (i.e., height) that the MTA identifies is bona fide, then their purpose could be achieved by adopting and validating a test for applicants that tests height directly as it relates to driving a bus.

At this point in the Supreme Court case of Dothard, supra, the Court entered a footnote, i.e., footnote 15. Note 15 in the Dothard text cited the EEOC Guidelines on Employee Selection Procedures, 29 CFR §1607, which established detailed empirical validation requirements for employee selection tests, etc.[14] In the present case, it was this empirical validation that the MTA admitted it had not per-

14. See Code of Federal Regulations, Title 29 - Labor, Part 1607, Revised of July 1, 1974, which defines "test" at 1607.2; empirical validation at 1607.5; the requirements for presentation of validity evidence at 1607.6; and expressly provides in 1607.8 that under "no circumstance will the general reputation of a test, it author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are... testimonial statements of sellers, users, or consultants; and other nonempirical or anedoctal accounts of testing practices or testing outcomes." (Emphasis added.)

formed in regard to its height requirements, and it was this same validation that the trial court herein repeatedly held was not applicable "in all contexts," and in particular was not applicable to the MTA.

Passing on from the issue of job relatedness to the issue of BFOQ, the Dothard case edicted a formula for such tests that was completely ignored both in letter and spirit by the trial court involved here and by the Fourth Circuit. The language of the Supreme Court in this regard reads:

> We are persuaded - by the restrictive language of §703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission - that the BFOQ exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. (Emphasis added).

97 S.Ct., 2729. As an example of the extreme narrowness that the Supreme Court had in mind for BFOQ exceptions in this regard was its citation of two Court of Appeals decisions in Dothard that held that BFOQ exceptions are valid only if they exclude a class exclusively, or if not exclusively,

if they exclude substantially all of that class, etc. See the decisions of Diaz v. Pan American World Airlines, 442 F.2d 385, 388 (5th Cir. 19__), and Weeks v. Southern Bell, 408 F.228, 235 (5th Cir. 19__), and the Supreme Court description of these cases relating to BFOQ exceptions. Dothard, supra, 97 S.Ct. 2729. [15]

Accordingly, it is submitted that the trial court's conclusion that the MTA had proven a BFOQ exception in this case was not supported by the evidence, was plainly erroneous, and was a misapplication and erroneous conclusion of law by the trial court. Lastly, it is submitted that the trial court's finding that no reasonable alternatives were available to the MTA other than estalishing the height requirements involved here, etc. was upon the evidence submitted in this case clearly erroneous, and legally in error. As submitted by the named plaintiff, the

15. The Supreme Court while citing the Diaz and Weeks cases, and discussing their holdings, admittedly did not reach the issues involved in those cases, and did not otherwise express an opinion regarding the correctness of their holdings in regard to BFOQ exceptions being valid only if they exclude all persons of the excluded class, etc.

MTA first did not prove that it needed the height requirements for the safe and efficient operation of its buses, and assuming for argument that it did, the plaintiff submits that the MTA could have modified its equipment if it felt the height requirement was valid to accomodate women bus drivers of average height in the United States, and secondly, in the absence of modification of its buses, it could have hired female employees of the plaintiff's height and let them drive all its buses except the old style buses, etc.In essence, the plaintiff submits that the evidence shows employees of her height had no problem at all with the great majority of MTA's buses, and accordingly submits that the MTA, as a reasonable alternative could have permitted her (and other females of her height, etc.) to drive the so-called newer equipment, rather than adopting an arbitrary blanket exclusion that excluded some 70 percent of American females from consideration for employment as bus drivers because of their height. The Court of Appeals' assertion in Part III of its Opinion that the plaintiff did not "dispute the necessity" of the company's requirement that

each operator was required "to drive any and all vehicles in service at their assigned divisions," fell short of the mark. The company never proved the necessity of the requirement; therefore there was simply no requirement for the plaintiff to dispute the absence of proof in this regard.

Based upon the foregoing matters, and upon holding of the Supreme Court in Dothard v. Rawlinson, supra, wherein the Supreme Court held in a case clearly on all fours with the present case, in regard to the disparate impact of height restrictions of the kind involved here, was in violation of Title VII and, in view of the failure of the MTA in the present case to prove a defense of BFOQ or business necessity, a finding for the plaintiff upon her individual claim is mandated.[16]

16. Also see, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), at 798. In Lorillard the Fourth Circuit also set forth the heavy burden placed on an employer defendant in a Title VII action in regard to proving business necessity to rebut a prima facie case of disparate impact. The Court held as follows: "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because this decision conflicts with the decision of the Fifth Circuit, i.e., Weeks v. Southern Bell Telephone and Telegraph Co. (5th Cir., 19), 408 F.2nd 228, 235, and Diaz v. Pan American Airways, 442 F.2nd 385, 388 (5th Cir., 19) wherein the Fifth Circuit ruled that an employer could rely on the BFOQ exception only by proving "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." (Emphasis added.) Particularly see this Court's discussion of the exception in Dothard v. Rawlinson, 975 S.Ct. 2720, 2729 (1976).

Here there was no proof that the employer had reasonable cause to believe that all persons under

(16. con't.) carry out the business purpose it is allged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

the restricted height requirement, or that substantially all persons under the height requirement, would be unable to perform safely and efficiently the duties of bus driver. Nor was it even shown that it was impractical for the company to deal with persons under the height minimum to ascertain if they could individually safely operate a bus. Here the evidence was that the plaintiff was not even tested at all in 1974 when she was denied employment. Moreover, the evidence did show that when she was finally tested in 1976 (and once again denied employment), that persons below the minimum height requirement might still be found eligible if they passed their employer's subjective, and opinion based, non-validated driver's "test," a procedure which had resulted in an almost exclusive male only driving force in the company in the years involved.

This Court should also grant this writ because the decision of the trial court, granting a BFOQ exception in this case, was not an "extremely narrow exception" as specifically edicted by this Court in Dothard v. Rawlinson, supra, but was in fact an extremely

broad exception, based on an employer's non-validated, subjective opinion, that some people below a certain height were unsafe to drive MTA buses, while other persons of the same or like height were safe to drive these same buses, etc. This Court should also grant this writ because this decision makes a mockery out of the ruling announced by this Court in Dothard, supra, wherein this Court provided for an EEOC Guidelines type validation of job requirements of the exact nature as those involved here, a provision which both the District Court and Court of Appeals ignored.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Allan B. Rabineau , a member of the Bar of the Supreme Court of the United States and counsel of record for Palestine Boone, hereby certify, that pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for a Writ of Certiorari on the defendant appellee herein by mailing said copies, postage prepaid, to counsel of record for such party, i.e., Glenn E. Bushel, Esquire, 36 South Charles Street, Sixth Floor, Baltimore, Maryland 21201 on this 15th day of July, 1984.

All parties required to be served have thus been served.

Allan B. Rabineau

Allan B. Rabineau

Luther C. West

UNPUBLISHED

UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1837

Palestine Boone, Individually
and on behalf of all other persons
similarly situated,

Appellant

vs.

Mass Transit Administration

Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Before RUSSELL and ERVIN, Circuit Judges, and KNAPP, District Judge.*

Luther C. West (West, Carey, Frame and Barnstein on Brief) for Appellants; Joseph S. Kaufman (Glenn E. Bushel on brief) for Appellee.

---

* Honorable Dennis R. Knapp, Senior United States District Judge for the Southern District of West Virginia, sitting by designation.

PER CURIAM:

In August 1974 Palestine Boone applied for a job as a bus driver with the Baltimore Mass Transit Administration (the MTA). The MTA turned her down because she failed to meet their height requirement. After the Equal Employment Opportunity Commission (the EEOC) intervened to conciliate on her behalf, Boone reapplied and obtained the job in January, 1979. Boone subsequently brought a class action suit alleging that the MTA's height requirement discriminated against women. She sought damages for the period in which the MTA had denied her employment. The district court denied Boone's motion for class certification. After the parties stipulated to most of the relevant facts, the court granted summary judgment for the MTA on the ground that the height requirement was a bona fide occupational qualification (BFOQ). Boone appeals from both rulings. Finding no merit in her arguments, we affirm.

I.

When Boone first applied for a job as a bus driver with the MTA, the company required that applicants be between five feet six and six feet two inches tall. On May 10, 1976, the MTA dropped the height requirement and began testing all applicants on buses. Boone filed charges with the EEOC in August 1974 immdeiately after she was denied employment. Following negotiations and attempts at conciliation, the MTA agreed to test Boone's ability to drive MTA buses safely. Boone sat in the operator's seat of an "old style coach " [1] while an MTA manager stood three feet in front of the coach and held his hand out at waist level to approximate the height of a small child. Boone was unable to see

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1 As of October 1, 1974, the MTA's fleet consisted of 924 buses, 199 of which were of the old style. The old style coaches had smaller windshields, which restricted vision for shorter people, and the operators' seats were further from the pedal than in the modern buses.

his hand. Vertis Park, Superintendent of the MTA Safety and Training Department, observed Boone in the operator's seat and noticed that she was "unable to remain firmly in her seat while depressing the brake pedal, and had to extend her leg to the fullest in order to do so." Park concluded that Boone's inability to see waist high objects positioned three feet in front of the bus, coupled with her difficulty in reaching the pedals, rendered her incapable of safely driving old style buses.

II.

Boone argues that the district court erroneously denied her motion for class certification. Boone proposed three classes for certification:

> 1. All future females who will apply for jobs as bus drivers for the (MTA); and who may be rejected because of height requirements;
>
> 2. All females who have applied for a job as a bus driver of the (MTA) and were denied em-

ployment from October 14, 1973, through May 1, 1976, for failure to meet minimum height requirements;

and

3. All females who would have applied for employment as bus drivers with the (MTA) from October 14, 1973, through May 1, 1976, except for the fact that they were aware of the defendant's policy of denying females employment who were below stated height requirements.

(App. 50) The district court correctly refused to certify the first and third classes. Boone was simply not a member of those classes. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." East Texas Motor Freight System v. Rodriquez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974)).

A comparison of the rule under which Boone sought certification and the relief available to the second class reveals that the district court correctly declined to certify that

class as well. Boone sought to certify the second class under Fed. R. Civ. P. 23(b)(2), which states:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby amking sppropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole ....

Because the MTA has discontinued its height requirements, appropriate injunctive or declaratory relief for the second class is simply not available. Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23(b)(2), advisory committee note (1966).

III.

Boone also contends that summary judgment should not have been entered for the MTA but should have been granted in her favor. The

district court concluded that the MTA's minimum height requirement was a bona fide occupational qualification "essential to the safe and efficient operation of [the MTA's] business as a public carrier." The MTA's test of Boone revealed that she could not safely drive old style buses which, admittedly, constituted only about twenty percent of the MTA fleet in 1974. Although the record does not reveal why shorter perople could not be hired to drive the more numerous modern buses, the parties stipulayed that "each operator is and was required to drive any and all vehicles in service at their assigned division...." Boone does not dispute the necessity of this requirement; on the contrary, counsel for Boone inexplicably and vehemently insisted at oral argument that there was no genuine issues of material fact in this case. Counsel for Boone hinged the appellant's case on the argument that the MTA's performance test was inadequate as a matter of law because it was not formally validated.

The district court, however, found that formal validation was not required because public safety was at stake. See e.g., Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972). We agree with the district court that the MTA's requirements that Boone be able to see waist level objects three feet in front of the bus and that she be able to depress the brakes without straining did not need formal validation. They were manifestly job related.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PALESTINE BOONE	*	
Plaintiff	*	
vs.	*	CIVIL ACTION NO:
MASS TRANSIT ADMINISTRATION	*	R-80-353
Defendant	*	

* *

MEMORANDUM AND ORDER

I. Introduction.

An initial hearing on the cross-motions for summary judgment was held on October 25, 1982, but when it became apparent that issues of fact would prevent decision under Fed.R.Civ.P. 56, the hearing was cut short and the motions denied. Subsequent to that hearing date, counsel for both sides met and entered into a written stipulation resolving the material factual disputes. Currently before the Court are the resurrected cross-motions for summary judgment filed by plaintiff and defendant, which were fully argued on June 3, 1983. For the following

reasons, the Court grants defendant's motion.

II. Statement of Facts

The case arises over the Mass Transit Administration's (MTA's) former requirement than an applicant for a bus driver be between five feet six inches and six feet two inches tall without shoes. Plaintiff has been measured at five feet one and one-half inches tall, although she claims that she is really closer to five feet three inches tall. In August, 1974 plaintiff was denied employment with the MTA because of her height. In January, 1979, she successfully procured employment with the MTA. She now seeks back pay and seniority from the date of her initial rejection, August 2, 1974, until her actual starting date of January 5, 1979.

Plaintiff contends that the height requirement imposed by the MTA had disparate impact on females. She states that defendants did not conduct validation studies under the standards advanced by the landmark case of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Prior to the company's termination of the five foot six inches minimum height requirement in 1976, plaintiff contends that the company hired

numerous drivers who were less than five feet six inches tall and who drove the "old type" equipment, which is the type that allegedly presented problems for short and tall people. Plaintiff also states that defendant hired many female drivers less than five feet six inches tall after 1976 who subsequently drove the old equipment until the equipment's 1978 phase out.

Defendant replies that in the first instance it is dubious that the height requirements caused any disparate impact on female job opportunities. Although the five foot six inch requirement may be detrimental to females, the six foot two limit would affect males adversely. In addition, defendant asserts, the height requirement constitutes a bona fide occupational qualification (BFOQ) and/or business necessity. Defendant points out the legitimacy of protecting the public's interest and safety with such a regulation. Defendant argues that the short drivers referred to by plaintiff were "grandfathered" into defendant's employment when defendant acquired private carriers and, in any event, these other drivers were taller than plaintiff and could safely operate

the equipment.

Even if disparate impact could be shown, defendant disputes that there is any evidence of damages offered by plaintiff. Defendant also asserts the equitable defense of laches as barring plaintiff's suit. Sixty-six (66) months elapsed from the filing of the administrative charge until filing of the suit.

The parties stipulated to the following relevant facts. Between July 9, 1976 and October 27, 1978, the defendant employed eleven females less than five feet six inches in height who successfully passed actual safety checks designed to determine their ability to safely operate MTA equipment. These safety checks included testing on "old-type" coaches (Series 1900-1949). Although it is not known whether these individuals actually operated an "old-type" coach while employed by the MTA, each operator was required to drive any and all vehicles in service at their division, and they may have operated these "old-type" coaches.

Between May 25, 1979, and March 14, 1980, defendant employed five females less than five feet six inches tall, who successfully passed actual safety

checks designed to determine their ability to safely operate MTA equipment. The safety checks did not include testing on" old-type" coaches.

Between May 19, 1976 and March 3, 1977, defendant rejected four female applicants less than five feet six inches in height, who did not successfully pass actual safety checks designed to determine their ability to safely operate MTA equipment. These safety checks did include testing on "old-type" coaches.

Between March 13, 1979 and December 6, 1979, defendant rejected two female applicants less than five feet six inches in height, who did not successfully pass the actual safety checks. These safety checks did not include testing on "old-type" coaches.

The procedural history of this case is as follows. After being denied employment by the MTA, plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that the MTA had violated Title VII 42 U.S.C §2000e et seq., because the height requirement allegedly discriminated against her on the basis of sex. On September 16, 1975, the EEOC issued a written determination finding

"reasonable cause to believe" that the MTA had violated Title VII.

Negotiation and attempts to conciliate ensued, and the MTA agreed to give plaintiff an opportunity to be tested on MTA equipment then in use to determine whether she was capable of safely operating the coaches. This testing was carried out in March, 1976. According to the affidavits of MTA personnel, they concluded that plaintiff was not able to safely operate the older type equipment then in service. Specifically, they determined that plaintiff had difficulty depressing the brake pedal and that her vision might be impaired because of her size. Based on the test results, the MTA continued its refusal to hire the plaintiff.

In March, 1978, plaintiff again applied for employment with the MTA as a bus operator, and was examined and interviewed on December, 1978. In May of 1976, the MTA had instituted a policy change, and all applicants who were not within the height guidelines were given an opportunity for actual examination on board a bus. The MTA also at that time ceased incorporating the height requirements

in its advertising for applicants. Defendant states that by the time plaitiff was interviewed in December, 1978, the older model coaches comprised less than 2% of the MTA's fleet. Plaintiff was actually employed beginning January 5, 1979, as an operator assigned to the Harford division where there are no old style coaches. Plaintiff has been continuously employed as a bus operator since that time.

On November 27, 1979, the Attorney General sent notice to plaintiff that suit would not be instituted as a result of the EEOC proceeding, which had been filed five years earlier. Plaintiff brought this action in February of 1980, pertaining solely to the MTA's failure to hire her in 1974 and in no way related to her actual employment by the MTA since January, 1979.

II. Legal Discussion

A grant of a motion for summary judgment is appropriate only when there is no genuine dispute as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed.R. Civ.P. 56; National Constructors Ass'n v. National Contractors Ass'n, Inc., 598 F.Supp.510, 520 (D.

Md. 1980), modified on other grounds, 678 F.2d 942 (4th Cir. 1982). In addition, there should be "no disagreement as to the inferences which may be drawn from the undisputed facts." Steinberg v. Elkins, 470 F.Supp. 1024, 1030 (D. Md. 1979). The burden is on the moving party and any doubts as to the existence of a genuine issue of material fact will be resolved against the movant. See Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The Court is satisfied that the issue to be resolved is one of law and not of fact and that decision under Rule 56 is appropriate.

The essence of plaintiff's complaint is that the height requirement utilized by defendant in hiring its bus drivers discriminated against females. She claims that the MTA's facially neutral height standard had a disparate impact upon females. She does not allege disparate treatment as such, within the meaning of Title VII, against her or similarly situated individuals. Defendant, while not conceding that a prima facie case of disparate impact has been shown, contends that its height requirement was bona fide occupational qualification under 42 U.S.C. §2000e-2(e)

(1).

The first step to be taken by a court engaging in Title VII disparate impact analysis, is to determine whether "the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). If the plaintiff is successful, the burden shifts to the employer to prove "that any given requirement has...a manifest relation to the employment in question." Id., quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In looking at whether plaintiff can establish a prima facie case of discrimination, the Court would first note that any disparate impact analysis would have to recognize that the MTA's height standard eliminated persons over six feet two inches tall in addition to those five feet six inches in height. At the upper end of the spectrum, it would clearly be men who would be suffering the impact of defendant's regulations. The Court, however, upon review of similar cases in which minimum height requirements were found to have disparate impact upon females, will assume without deciding that plaintiff would indeed prove a prima facie case of discrimination.

The linchpin issue, and one which the Court believes is appropriate for summary judgment disposition, is whether defendant can successfully defend its minimum height requirement as a BFOQ. If defendant an meet its burden of showing that its height requirement was "necessary to safe and efficient job performance," then defendant has met its burden under Title VII. Dothard v. Ralinson, 433 U.S. at 331, n. 14 (1977); Griggs v. Duke Power Co., 401 U.S. at 431. If the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without similar discriminatory effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'". Albemarle Pape Co. v. Moody, 422 U.S. 405, 425 (1975), quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

Having considered the record as a whole, including affidavits of the MTA personnel, the Court is convinced that the MTA's height requirement was essential to the safe and efficient operation of its business as a public carrier. The requirement

meets the "reasonably necessary" standards imposed by the statutory provisions of Title VII and the case law which interprets it. It is well established that the public's interest in safety is "paramount and justifies high employment standards." See Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 837 (D.C. Cir. 1977). In doing a sliding scale analysis, as the economic and human risk involved in hiring an unqualified applicant increase, the employer bears a corresondingly lighter burden to show that his employment criteria are job realted. See, e.g., Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972). When confronted with a similar situation, the United States Court of Appeals for the Eighth Circuit sustained a height requirement as a business necessity where it was shown that one's ability to function properly as an airline flight officer was dependent upon height, which was essential to the safe and efficient operation" of an airplane. Boyd v. Ozark Airlines, Inc. 568 F.2d 50, 53-54 (8th Cir. 1977).

Based on the affidavits submitted by defendant, the Court finds that the MTA's height standard was

professionally determined, and that because of the configuration of the old-type coaches, persons not meeting the height requirements in all likelihood could not safely operate the equipment because of limited vision. An employer must be allowed "...substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." Usery v. Tamiani Trails Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976). The Court will not interfere with the policy decision of the MTA because it finds that the height standard was motivated by the MTA's "interest in operating safe and efficient transportation system rather than by any special animus against a specific group of persons." New York City Transit Authority v. Beazer, 440 U.S. 568, 593 n.40, 594 (1979).

Plaintiff was actually tested on the old-type equipment and company representatives found that she was unable to safely operate it. After the phase out of the old-type equipment, she applied again and did in fact receive a job. She operated newer model buses which had full-vision windshields, and plaintiff admits that she has never driven an "old-type"

series bus. Affidavit of Palestine Boone, para. 14.

Plaintiff relies heavily on what she claims is a mandatory requirement that any test used by plaintiff be properly validatd as a true measurement of job performance, once a prima facie case of discriminatory impact has been made out. Plaintiff cites the guidelines of the Equal Employment Opportunity Commission, 29 CFR 1607 et seq. as controlling and contends that at no time did defendant validate its prformance test as required by these guidelines to determine whether the selection device was sufficiently job-related to comply with Title VII. Defendant admits that it did not empirically analyze its employment standards, but submits that its job requirements were professionally developed and essential to its business.

Upon review of the Supreme Court cases of Albemarle Paper and Dothard v. Rawlinson and their progeny, it is apparent that formal empirical validation of employment tests, as described in the EEOC guidelines, is not required in all contexts. As previously noted, the Spurlock decision expressly stated that when a job "...requires a high degree of skill and

the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." 475 F.2d at 219. The United States of Appeals for the Fifth Circuit in Usery v. Tamiani Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976) held:

> The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to ensure safe driving.

Id. at 236.

Under the circumstances, courts have upheld objective job criteria in the face of a discriminatory effect where there has been no formal empirical validation. Boyd v. Ozark Airlines, Inc., 568 F.2d 50 (8th Cir. 1977) (minimum height requirement for pilots constituted BFOQ and empirical validation not required); Usery v. Tamiani Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976) (evidence presented other than formal validation demonstrated that age limitation placed on bus drivers was reasonably necessary to essence of business); Spurlock v. United

Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (requirements of college degree and minimum of 500 flight hours to qualify as airline pilots found job-related without validation); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (objective educational job criteria did not require validation); Scott v. University of Delaware, 455 F. Supp. 1102 (D. Del. 1978) (degree requirement justified by legitimate interests of university in hiring and advancement with empirical test data); United States v. Lee Way Motor Freight, 7 EPD ¶9066 (D. 1973) (height and weight requirements for truckers "necessary and essential" so as to qualify as BFOQ).

The Court finds that empirical validation is not required under the circumstances of this case in light of "the significance of safety to passengers and members of the public" Tamiani Trail Tours, Inc., 531 F.2d at 238, when it comes to bus transportation. The comany was faced with basic problem in hiring its bus drivers -- people of certain height could not safely drive the available equipment. The company must be accorded some reasonable leeway in ensuring the safety of passengers and others. Em-

pirical validation is not essential in this context.

Accordingly, the Court finds that defendant's height requirement in 1974 was a BFOQ which defeats any disparate impact that plaintiff might possibly prove.

Plaintiff also suggests, in accordance with the third prong of Title VII analysis, that alternatives were available to defendant because defendant did in fact employ drivers who were less than the minimum height. Defendant has submitted affidavits that state that those drivers who were less than the minimum height requirement before 1976 were grandfathered into defendant's employment. After 1976, when defendant's employment policy was liberalized, applicants who successfully passed actual safety checks on old-type coaches were hired, even though they did not meet the minimum requirement. Plaintiff is shorter than any of these drivers, and did not meet the same safety tests.

Plaintiff also suggests that the MTA could have purchased buses that were better designed for operation by shorter drivers prior to 1976. However, the MTA is not a manufacturer and is under no duty

to redesign buses or purchase those better suited for short or tall drivers.

The Court rules that plaintiff has not met the shifted burden of showing that other selection devices without similar discriminatory effect would also have served the employer's legitimate interest in safe and efficient job performance.

IV. Conclusion.

For all the reasons stated, the Court finds that defendant's height requirements were dictated by safety considerations and even if a prima facie case of disparate impact could be proven, defendant was justified in using this selection criteria as a BFOQ. Reasonable alternatives other than actual testing of individuals which defendant in fact implemented, were unavailable to defendant. Accordingly, for the reasons herein stated, it is this 5th day of August, 1983, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion for summary judgment be GRANTED; and

2. That the Clerk of the Court shall mail copies of this Memorandum and Order to all counsel of record.

Norman P. Ramsey
United States District Judge

JUDGMENT

In accordance with the Memorandum and Order dated August 8, 1983, and filed in the above entitled case, it is

ORDERED AND ADJUDGED:

That judgment is hereby entered in favor of the defendant and against the plaintiff.

Norman P. Ramsey
United States District Judge

No. 84-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PALESTINE BOONE,

Petitioner,

v.

MASS TRANSIT ADMINISTRATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1984

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Petitioner,

v.

MASS TRANSIT ADMINISTRATION,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In the 31 pages of the Petitioner's Petition for Writ of Certiorari including the Statement of the Case, The Evidence, and the Rulings Below,[1] the central facts are obscured. Accordingly, the Respondent Mass Transit Administration (MTA) will set forth its own Statement of

[1] The Petition's format in this respect fails to comply with Rule 21 of the Supreme Court Rules.

the Case in order to emphasize some important particulars.

The MTA is a unit within the Maryland Department of Transportation, a principal department of State government. Maryland Code, Transportation Art. §§ 2-101, 2-107(a)(3), 7-201. The MTA's legislative mandate is to develop and operate transit facilities within the Metropolitan Transit District, encompassing Baltimore City, Baltimore County, and Anne Arundel County.[2] Maryland Code, Transportation Art., §§ 7-101(d), 7-102. The Maryland Legislature has determined that the activities of the MTA "are essential governmental functions," and has bestowed upon the MTA the right to determine the qualification and appointment of its employees without regard to the laws of Maryland relating to other State employees. Maryland Code, Transportation Art., §§ 7-206(a)(2), 7-704.

In recent years, the MTA has employed approximately 2,000 people in its Bus Division. In the course of fulfilling its public role, during the mid-1970s the MTA transported over 120,000,000 passengers per year, and covered approximately 25,000,000 miles annually. Applicants for positions as bus drivers with the MTA, as well as bus driver applicants elsewhere, have had to meet certain physical standards which were developed by a group of physicians. Among these MTA standards was the requirement that an applicant be between 5′6″ and 6′2″ tall without shoes, and it is this physical standard with which Petitioner took issue in this case.

The Petitioner Palestine Boone instituted this litigation during February, 1980 alleging that the MTA dis-

[2] The MTA may also contract to provide transit facilities and services in any Maryland county continguous to the Metropolitan Transit District. Maryland Code, Transportation Art., § 7-204(f).

criminated against her during 1974 in contravention of Title VII of the Civil Rights Act of 1964, when it declined to hire her as a bus driver. The MTA contended that Petitioner's claim was precluded by laches, that its then existing height requirement did not discriminate, and that, in any event, the height requirement was a bona fide occupational requirement and/or a business necessity. The bona fide requirement arose from the physical realities of transit equipment which was in service when the height standard was extant; as newer coaches were designed, developed and acquired by the MTA during the 1970s, their full-vision windshields obviated the need for the requirement, it was eventually discarded, and Petitioner was hired by the MTA as a bus operator beginning in 1979. This uncontradicted factual setting is the determinative element in this case.

After entering into stipulations, and agreeing that material facts were not in dispute, each of the parties moved for summary judgment. After the cross motions were argued, Judge Ramsey issued a Memorandum and Order granting the MTA's motion concluding that the MTA's height standard was, at the time in question, a bona fide occupational qualification. Petitioner then noted an appeal to the United States Court of Appeals for the Fourth Circuit which affirmed the decision of the District Court.

Petitioner first applied for employment as a bus operator with the MTA during 1973 when she was 21 years of age. When Petitioner was called to the MTA for interview and examination during August, 1974, she was denied employment because she did not meet the height requirement. When she first applied with the MTA in 1973, her Maryland driver's license indicated that her height was 4'11". During this period of time, when the MTA advertised for applicants for the position of bus

driver, the height standards were set forth among the requirements.

After being denied employment by the MTA, Petitioner filed charges with the Equal Employment Opportunity Commission (EEOC) alleging that the MTA had violated Title VII because the height requirement allegedly discriminated against her on the basis of sex. On September 16, 1975, the EEOC issued a written determination finding "reasonable cause to believe" that the MTA had violated Title VII.

Thereafter, as a result of administrative negotiation and attempts at conciliation, the MTA agreed to afford Petitioner an actual opportunity to be tested on MTA equipment then in use in order to determine whether she was capable of safely operating all coaches. Such testing was carried out in March, 1976. The testing procedure was observed by MTA safety personnel who concluded that Petitioner was not able to safely operate the older type equipment then in service. Specifically, it was determined that Petitioner had difficulty depressing the brake pedal, and would be unable to see a small child stepping off the curb to the driver's right. As a result of this testing, the MTA continued its refusal to hire Petitioner.

On May 10, 1976, the MTA Administrator made a policy determination that the height requirement would no longer be enforced on a "cut and dried" basis, but that applicants who might not be able to safely operate the equipment would be given an opportunity for actual examination on board a bus; it was also determined that the height requirements would no longer be used by the MTA in the course of its advertising for applicants. Beginning in 1973, and through May 10, 1976, applicants between 5′5″ tall and 5′6″ tall, and those between 6′2″ and 6′3″ tall had been actually tested by the MTA on buses to determine whether they could safely operate the coaches.

After May 10, 1976, applicants under 5′6″ tall were given safety checks which included testing on "old-type" coaches (series 1900-1949) when this equipment was in general service, and did not include such testing after a point when the utilization of "old-type" coaches became *de minimus*. Not surprisingly, some applicants successfully passed these safety checks, while others did not. Petitioner was one of the applicants who did not pass the equivalent of such a safety check on the "old-type" coach.

At the crux of this case is the fact that during the 1970s, the composition of the MTA's bus fleet changed significantly. Older type coaches which comprised over 20% of the MTA's fleet through the mid-1970s featured two windshield panels, each of which was only 20½″ high. Newer style coaches, which the MTA had been phasing in over the years, featured, among other improvements, full vision windshields which extended from approximately an operator's knee cap level to the ceiling of the coach. The configuration of the older style coach was such that operators who were under 5′6″ tall or over 6′2″ tall had a limited range of vision, a situation that did not prevail on the newer models. Diagrams of the older and newer style coaches appear in the record.

During March, 1978, Petitioner again applied for employment with the MTA as a bus operator, and was called down for examination and interview in December, 1978. By this time, the older model coaches comprised less than 2% of the MTA's fleet, and Petitioner was employed beginning January 5, 1979 as an operator assigned to the Harford Division where there were no old style coaches. It was stipulated that Petitioner's allegations have nothing to do with her actual employment by the MTA.

ARGUMENT

In her Petition for Writ of Certiorari the Petitioner essentially contends that the unpublished decision of the

Court of Appeals in this case creates a conflict among the Courts of Appeal, and that the decisions below were deficient. On the contrary, there exists no conflict whatever among the circuits on the issues involved here, and the decisions of both courts below were correct.

I. Absence of Conflict Among the Circuits

The decisions of the United States Court of Appeals for the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), and *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), do not conflict with the decisions here. *Diaz* and *Weeks* both considered situations where employers admitted that they discriminated on the basis of sex, and ability to do the job was not considered. 442 F.2d at 386; 408 F.2d at 231. In *Weeks*, the defendant introduced "no evidence" that women could perform the job (408 F.2d at 234), and in *Diaz*, the Court declined to allow an employer's "preference" for women to rise to a business "necessity" (442 F.2d at 388-89). In *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977), this Court generally characterized *Weeks* and *Diaz* to stand for the proposition that Title VII precludes refusals to hire individuals on the basis of "stereotypical characterizations of the sexes." The MTA's height standard did not consider an applicant's sex, and was proven, without contradiction, to be a legitimate BFOQ. Indeed, the record showed that for many years the MTA has been hiring more female than male bus drivers, which becomes especially significant when it is recognized that many more men than women have applied for the jobs.

In *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 53-54 (8th Cir. 1977), the Court sustained a height requirement as a business necessity where it was shown that one's ability to function properly as an airline flight officer was dependent upon height, which was "essential to the safe and

sufficient operation" of an airplane. The evidence in the case at bar "convinced" the District Court that the MTA's height requirement was essential to the safe and efficient operation of its business as a public carrier, and was certainly "reasonably necessary" to the normal operation of the MTA's business (A. 18). *See* 42 U.S.C. § 2000e-2(e)(1).

The public's interest and safety "is paramount and justifies high employment standards." *Kinsey v. First Regional Securities, Inc.*, 557 F.2d 830, 837 (D.C. Cir. 1977). Where "the economic and human risks" involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972); *Boyd v. Ozark Air Lines, Inc., supra*, 568 F.2d at 54.

Courts have recognized "the significance of safety to passengers and members of the public" in the context of the busing industry and job standards for bus drivers. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976). In *Usery*, in the course of considering the legality of a bus company's policy of refusing to consider applications from individuals above a certain age, the court concluded "that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb." *Id.; Murnane v. American Airlines, Inc.*, 482 F. Supp. 135, 147 (D.D.C. 1979).

II. Correctness of the Decisions Below

In the course of determining the merits of the case, the trial court assumed without deciding that Petitioner could prove a prima facie case of discrimination (A. 17), and went on to consider whether the MTA's height requirement was a bona fide occupational qualification

(BFOQ) for purposes of 42 U.S.C. § 2000e-2(e)(1). Believing that the BFOQ defense is viable in this case, and recognizing that *no evidence was offered* to counter the bona fides of the height requirement, the MTA will focus its attention on that aspect of the case.

Judgment was properly entered in favor of the MTA because the height requirement constituted a BFOQ and business necessity with respect to the MTA while that standard was in effect. It is not "an unlawful employment practice for an employer to hire and employ employees" on the basis of "a bona fide occupational qualification reasonably necessary to the normal operation of" the employer's "particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The purpose of Congress in enacting Title VII was:

> The removal of artificial, abritrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Standards that are "demonstrably a reasonable measure of job performance" are permissible, and, indeed, "controlling." *Id.* at 436. Because the MTA's height requirement was "necessary to safe and efficient job performance," Petitioner's Title VII challenge must fail. *Dothard v. Rawlinson, supra,* 433 U.S. at 331 n.14; *Griggs v. Duke Power Co., supra,* 401 U.S. at 431.[3]

As a procedural matter, petitioner essentially failed to effectively address or contradict the evidence produced on

[3] Apparently, there is some question whether the "business necessity" and "bona fide occupational qualification" defenses to Title VII claims are equivalent. *See* Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 674 (9th Cir. 1980). The *Harriss* case suggests that the business necessity defense would be applicable here because the MTA's height standard is facially neutral. *Id.* Whether the defenses are distinct, the MTA submits that its height standard passes muster under both.

behalf of the MTA. The MTA submitted that the configuration of "old-type" buses was such that drivers under 5'6" or over 6'2" had a limited range of vision, which was an actual, not imagined, reality. As the "old-type" buses were phased out, they were replaced with newer models which had full-vision windshields.

Once the MTA came forward and carried its burden of proving a BFOQ defense, it was then incumbent upon the Petitioner to produce evidence in derogation of the MTA's proof in this regard. No such counter-evidence was ever brought forward. While the Petitioner takes occasional potshots at the MTA's showing (*e.g.* Petition at 28-29), these do not overcome the deficiencies in the record from the Petitioner's standpoint. It seems strange indeed that the Petitioner who stipulated that no facts were in dispute, and never refuted the MTA's evidence, now finds fault with the agreed upon facts.

Petitioner's reliance upon *Dothard v. Rawlinson, supra,* and 29 C.F.R. §§ 1607.1 *et seq.* is sorely misplaced. In *Dothard* the female plaintiff had been denied employment as an Alabama prison guard because she failed to meet the minimum weight requirement. 433 U.S. at 323-24. A minimum height requirement also existed, and the plaintiff attacked both standards as violative of Title VII. In marked contrast with the record in the instant case, in *Dothard* the State of Alabama "*produced no evidence*" correlating its requirements with job performance, and "*failed to offer evidence of any kind* in specific justification" of the standards. 433 U.S. at 331 (emphasis supplied). In further contrast with the case at bar, in *Dothard* the plaintiff adduced evidence showing that the requirements were not job related. Unlike the defendant in *Dothard,* the MTA in this case proved to the trial court that its height requirement was a BFOQ for purposes of Title VII (A. 24). It is submitted that the MTA's standards in this case properly measured "'the person for the job and not the

person in the abstract.'" *Dothard v. Rawlinson, supra,* 433 U.S. at 332; *Griggs v. Duke Power Co., supra,* 401 U.S. at 436. Curiously, in her formulation of the Question Presented in her Petition, the Petitioner casts aspersions upon "subjective" evaluation of job applicants. This sort of subjective consideration is precisely what Title VII is all about.

The MTA not only serves the public, but itself is a public agency. The public's safety is and has been of paramount importance to the MTA, and as one means of protecting the public, the MTA has developed, with the input of private physicians employed for the purpose, physical standards for the employment of new bus operators. Thus, the height standard was professionally determined, and it has been shown that because of the configuration of the old type coaches contained within the MTA's fleet, persons less than 5'6" tall and over 6'2" tall could not safely operate the equipment because of limited vision. The height standard was plainly motivated by the MTA's "interest in operating a safe and efficient transportation system rather than by any special animus against a specific group of persons." *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 593 n.40 and 594 (1979). Although a classification will be upheld if it "is reasonable in substantially all of its applications," and will not be stricken "simply because it appears arbitrary in an individual case," when this particular applicant was actually tested on the old type equipment, her vision was, *in fact,* limited and she had difficulty in other areas as well. *O'Connor v. Board of Educ.,* 449 U.S. 1301, 1306 (1980) (Stevens, J., as Circuit Justice). Finally, it should not be overlooked that Petitioner did not offer any proof of damage, which of itself is dispositive of this case.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit is not in conflict with *Weeks*, *Diaz* or any other decision of a United States Court of Appeals. Neither has the Petitioner demonstrated any special or important reasons for granting a writ of certiorari, nor any public purpose to be served thereby. For the foregoing reasons, the Respondent Mass Transit Administration prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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